Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

(2)

No. 90-1218

In the Supreme Court of the United States

OCTOBER TERM, 1990

BENNY BAILEY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

NATHANIEL I. SPILLER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioners' motion to vacate the district court's judgment, and to remand with instructions to dismiss, when petitioners' appeal became moot only because they had complied with the district court's judgment enforcing the Secretary of Labor's administrative subpoenas.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allard v. *DeLorean*, 884 F.2d 464 (9th Cir. 1989)	7
Blackwelder v. *Safnauer*, 866 F.2d 548 (2d Cir. 1989)	7
Center for Science in the Public Interest v. *Regan*, 727 F.2d 1161 (D.C. Cir. 1984)	7
Clarke v. *United States*, 915 F.2d 699 (D.C. Cir. 1990)	11
Cover v. *Schwartz*, 133 F.2d 541 (2d Cir. 1942), cert. denied, 319 U.S. 748 (1943)	7
DeMasi v. *Weiss*, 669 F.2d 114 (3d Cir. 1982)	10
Dole v. *Barrios*, 1990 O.S.H. Dec. (CCH) ¶ 29,052 (N.D. Tex. 1990)	12
Dole v. *Trinity Indus. Inc.*, 898 F.2d 1049 (5th Cir. 1990)	12
Dole v. *Trinity Indus., Inc.*, 904 F.2d 867 (3d Cir.), cert. denied, 111 S. Ct. 555 (1990)	12
Donovan v. *Burlington Northern, Inc.*, 781 F.2d 680 (9th Cir. 1986)	10
Donovan v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)	12
Donovan v. *Mosher Steel Co.*, 791 F.2d 1535 (11th Cir. 1986), cert. denied, 479 U.S. 1030 (1987)	12
Donovan v. *Trinity Indus., Inc.*, 824 F.2d 634 (8th Cir. 1987)	12
Duke Power Co. v. *Greenwood County*, 299 U.S. 259 (1936)	11
EEOC v. *St. Regis Paper Co.*, 717 F.2d 1302 (9th Cir. 1983)	9, 10

Cases—Continued: Page

Federal Data Corp. v. *SMS Data Prods. Group*, 819 F.2d 277 (Fed. Cir. 1987) 8
FTC v. *Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985) 10
Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 (1979) 11
Industrial Steel Prods. Co. v. *OSHA*, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988) 12
Iron Arrow Honor Society v. *Heckler*, 464 U.S. 67 (1983) 9
Karcher v. *May*, 484 U.S. 72 (1987) 6, 9
Kennedy v. *Block*, 784 F.2d 1220 (4th Cir. 1986) .. 8
Kulp Foundry, Inc., In re, 691 F.2d 1125 (3d Cir. 1982) 13
Long Island Lighting Co. v. *Cuomo*, 888 F.2d 230 (2d Cir. 1989) 8
Memorial Hosp. of Iowa County, Inc., In re, 862 F.2d 1299 (7th Cir. 1988) 8
National Union Fire Ins. Co. v. *Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989) 6, 8
New Left Educ. Project v. *Board of Regents*, 472 F.2d 218 (5th Cir.), vacated, 414 U.S. 807 (1973) 11
Parker v. *Ellis*, 362 U.S. 574 (1960) 11
Preiser v. *Newkirk*, 422 U.S. 395 (1975) 11
Ringsby Truck Lines, Inc. v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982) 7
Rockford Drop Forge Co. v. *Donovan*, 672 F.2d 626 (7th Cir. 1982) 10
Scott & Fetzer v. *Dile*, 643 F.2d 670 (9th Cir. 1981) 10
Scott v. *Iron Workers Local 118*, No. 89-16001 (9th Cir. Mar. 20, 1991) 7
United States, In re, No. 87-5383 (D.C. Cir. Mar. 8, 1991) 8
United States v. *Cleveland Elec. Illuminating Co.*, 689 F.2d 66 (6th Cir. 1982) 13
United States v. *Constangy, Brooks & Smith*, 851 F.2d 839 (6th Cir. 1988) 7, 9

Cases—Continued: Page

United States v. *Garde*, 848 F.2d 1307 (D.C. Cir. 1988) 6, 7, 8, 9
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) 13
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 5, 9, 11
United States v. *Olson*, 604 F.2d 29 (8th Cir. 1979) 7
United States v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) 13
United States v. *Sweet*, 655 F.2d 54 (5th Cir. 1981) 7, 9
United States v. *Trinity Indus., Inc.*, 876 F.2d 1485 (11th Cir. 1989) 10, 12
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 10
Wisconsin v. *Baker*, 698 F.2d 1323 (7th Cir.), cert. denied, 463 U.S. 1207 (1983) 7-8

Statutes:

Occupational Safety and Health Act of 1970, § 8(b), 29 U.S.C. 657(b) 3
28 U.S.C. 636(b) 2

Miscellaneous:

1B J. Moore, *Moore's Federal Practice* (2d ed. 1984) 7, 9
13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1984) 7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1218

BENNY BAILEY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. D1-D2) is unreported. The memorandum opinion and order of the district court (Pet. App. B1-B15) is unofficially reported at 1990 O.S.H. Dec. (CCH) ¶ 28,898. The judgment of the district court (Pet. App. C1-C3) is unreported. The district court's order denying a stay pending appeal (App., *infra*, 1a-3a) is unreported. The report, with recommendations, of the United States magistrate (Pet. App. A1-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1990. A petition for rehearing was denied on October 2, 1990. Pet. App. E1-E2. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are thirteen employees of Trinity Industries, Inc.'s plant in Dallas, Texas. In May 1989, the Occupational Safety and Health Administration (OSHA), acting pursuant to a search warrant, undertook a safety compliance inspection of the plant. As part of the investigation, the OSHA compliance officer sought to interview a number of employees. When all but one of the identified employees declined the interviews, OSHA served them with administrative subpoenas. Pet. App. A10-A14, B2-B4.

The interviews required by the subpoenas were to take place at the plant on August 21, 1989. The employees came to the interviews accompanied by Trinity's attorney, who purported to represent them individually. When the employee at the initial interview insisted on the presence of Trinity's attorney as his counsel, the compliance officer objected and discontinued all the interviews. Pet. App. A16-A17, B4-B5.

2. On October 4, 1989, the Secretary of Labor filed an action in the United States District Court for the Northern District of Texas against each of the subpoenaed employees, seeking to enforce the administrative subpoenas. Pursuant to 28 U.S.C. 636(b), the court referred the matter to a magistrate. Pet. App. A1, B5. In response to a show cause order, petitioners filed a motion to dismiss, arguing that

the subpoenas were invalid. Trinity also filed a motion to intervene, asserting a need to protect against disruption from the interviews. *Id.* at A2-A9. After a hearing, the magistrate concluded that the subpoenas were valid. He therefore recommended that petitioners' motion to dismiss should be denied and that the subpoenas should be enforced. The magistrate also recommended against permitting Trinity to intervene in the case. Finally, the magistrate recommended that Trinity's attorneys not be permitted to represent the individual employees because of the obvious potential for conflict of interest. *Id.* at A31-A32; see *id.* at A3-A9, A18-A31, B6-B7.[1]

The district court, applying a standard of de novo review, adopted the magistrate's findings and recommendations. Pet. App. B1. The court concluded that both Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), and OSHA's internal operating procedures authorized the administrative subpoenas, and that these particular subpoenas were reasonable. Pet. App. B10-B11. Accordingly, it held that the Secretary was entitled to enforce the subpoenas. *Id.* at B12. The court directed that the interviews be conducted at a mutually convenient time and place acceptable for all concerned, *ibid.*, and barred Trinity's counsel from representing the employees. *Id.* at B13. Finally, the court ruled against Trinity's motion to intervene because the enforcement order stipulated that the interviews were to be conducted so as not to create a substan-

---

[1] The magistrate also set aside the entry of default against one employee and recommended against the Secretary's motion to hold in contempt those employees who did not personally appear at the magistrate's hearing. Pet. App. A31-A32; see *id.* at A9-A10, A29-A30, B6.

tial disruption of the company's work force, thus obviating the stated basis for intervention. *Ibid.*

In its judgment of April 23, 1990, the district court incorporated these holdings and specified the time and place for each interview. All the interviews were scheduled to occur between April 30 and May 4, 1990, subject to modification upon a showing of substantial disruption to the company's work force. Pet. App. C2-C3. The district court denied a motion to stay enforcement of the subpoenas pending appeal, holding that petitioners were not likely to succeed on the merits and that a stay would not serve the public interest in workplace safety. App., *infra*, 1a-3a; see Pet. 5. On April 30, 1990, the court of appeals likewise denied a stay. App., *infra*, 4a. Petitioners then provided the subpoenaed testimony as scheduled. Pet. 5.

3. In the meantime, petitioners had filed a notice of appeal from the district court's judgment denying their motion to dismiss and enforcing the subpoenas. See App., *infra*, 5a-6a. Following completion of the interviews, petitioners moved to dismiss their appeal as moot and to vacate the judgment of the district court with directions to dismiss the case. The Secretary also moved to dismiss the appeal as moot, but opposed petitioners' motion to the extent that it sought to vacate the district court decision. In an unpublished order, the court of appeals summarily denied petitioners' motion to vacate and granted the Secretary's motion to dismiss the appeal as moot. Pet. App. D1-D2.

ARGUMENT

Petitioners seek this Court's review—indeed, summary disposition on the merits (see Pet. 7)—of their contention that the court of appeals erred in denying their motion to vacate the district court's judgment as moot, and to remand with instructions that the case be dismissed. Contrary to petitioners' contention, the principles articulated in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), do not require a court of appeals to grant a contested motion to vacate a district court's judgment in the circumstances presented here—when a case has become moot on appeal only because the appellant has chosen to comply with the district court's order enforcing a subpoena for testimony.

1. In *Munsingwear*, this Court noted that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. That practice, the Court explained, "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40. In *Munsingwear*, the Court held that because the government had not availed itself of this procedure for vacating a lower court judgment in a case that had become moot while on appeal, the government was bound by principles of res judicata with respect to the underlying, unvacated judgment. *Id.* at 40-41.

The rationale of *Munsingwear* suggests an important qualification to the scope of that doctrine. *Munsingwear* protects a party against the res judi-

cata consequences of a judgment where the party was deprived of appellate review through the fortuity of mootness. But it is not necessary to afford that protection to the losing party when that party has chosen, while the case is on appeal, to take action rendering the case moot. This qualification is reflected in the language of *Munsingwear* itself: the Court referred to cases where review "was prevented through happenstance." More recently, in *Karcher* v. *May*, 484 U.S. 72, 83 (1987), the Court made a similar point in holding that "the *Munsingwear* procedure is inapplicable" where the controversy had ended because the losing party had abandoned its prosecution of an appeal. The Court distinguished that situation from a case in which "the controversy * * * become[s] moot due to circumstances unattributable to any of the parties." *Id.* at 83.

When mootness *is* attributable to the party challenging the judgment, the equitable principles underlying *Munsingwear* do not require protection of that party against the res judicata consequences of the judgment.[2] As the court explained in *United States* v. *Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988):

> The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision[s] of the trial court "to have them wiped from the books" by merely filing an

[2] The *Munsingwear* procedure is not jurisdictional. See *National Union Fire Ins. Co.* v. *Seafirst Corp.*, 891 F.2d 762, 766 (9th Cir. 1989) ("The *Munsingwear* rule is neither statutorily nor constitutionally required. It is equitable in nature, designed to maintain fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision.").

> appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision.

To grant such a motion in these circumstances would enable a "litigant * * * to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal." *Ibid.*, quoting 1B J. Moore, *Moore's Federal Practice* ¶ 0.416[6], at 543 (2d ed. 1984). See also *Cover* v. *Schwartz*, 133 F.2d 541, 546 (2d Cir. 1942), cert. denied, 319 U.S. 748 (1943); *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982).[3]

In line with those principles, several courts of appeals have refused to vacate a district court judgment, when a case became moot on appeal, "where the losing party deliberately mooted the question on appeal so as to destroy the preclusive effect of a final judgment below." *Garde*, 848 F.2d at 1310 n.6; see *Allard* v. *DeLorean*, 884 F.2d 464 (9th Cir. 1989); *United States* v. *Constangy, Brooks & Smith*, 851 F.2d 839, 842 (6th Cir. 1988); *Center for Science in the Public Interest* v. *Regan*, 727 F.2d 1161 (D.C. Cir. 1984); *United States* v. *Sweet*, 655 F.2d 54 (5th Cir. 1981); *United States* v. *Olson*, 604 F.2d 29 (8th Cir. 1979); cf. *Blackwelder* v. *Safnauer*, 866 F.2d 548, 550-551 (2d Cir. 1989); *Wisconsin* v.

---

[3] Although *Ringsby* has been criticized, see 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 431-432 (2d ed. 1984), the Ninth Circuit continues to apply its principles. See *Scott* v. *Iron Workers Local 118*, No. 89-16001 (Mar. 20, 1991).

Baker, 698 F.2d 1323, 1330-1331 (7th Cir.), cert. denied, 463 U.S. 1207 (1983).[4]

In *Garde*, the court of appeals applied this principle in a context analogous to the present case. The Nuclear Regulatory Commission subpoenaed information from an attorney representing certain whistleblowers. When the attorney refused to comply, the agency brought an enforcement action in district court. The court denied enforcement and "advised the NRC that it must pursue less intrusive alternatives to obtain the information sought." 848 F.2d at 1308. While the NRC's appeal was pending, the NRC used less intrusive means to acquire substantially all the information it sought in the subpoena. It then moved the court of appeals to dismiss the case as moot and to vacate the judgment below. The court of appeals refused to do so, saying: "Appellant,

---

[4] A related but distinct issue, not presented here, is whether settlement of a case on appeal requires the issuance of a *Munsingwear* order, at least if no party opposes a motion to vacate. Cf. p. 13, *infra*. The courts of appeals are divided on this issue. Compare *Long Island Lighting Co.* v. *Cuomo*, 888 F.2d 230, 233-234 (2d Cir. 1989) (dismissal and vacatur required where parties have agreed on settlement and vacatur of the decision below); *Federal Data Corp.* v. *SMS Data Prods. Group*, 819 F.2d 277, 279-280 (Fed. Cir. 1987) (same); *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986) (same); with *National Union Fire Ins. Co.*, 891 F.2d at 765-769 (remand to let district court determine whether to vacate where case mooted by settlement); *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1301 (7th Cir. 1988) (vacatur not appropriate where parties have mooted case through settlement); *In re: United States*, No. 87-5383 (D.C. Cir. Mar. 8, 1991) (*Munsingwear* order not appropriate when losing party chooses to settle case rather than pursue an appeal, even when prevailing party supports the motion to vacate).

the losing party, has complied with the district court judgment and as a result, rendered the appeal moot. When 'the appellant complie[s] with the judgment, * * * the trial court's determinations ought to have the same conclusive effects that they would have if the appellant had not appealed at all.'" *Id.* at 1310 n.7, quoting 1B J. Moore, *Moore's Federal Practice* ¶ 0.416[6], at 543-544 (2d ed. 1984).[5]

2. This case is in the same mold. As in *Garde*, post-judgment compliance rendered the appeal moot[6] but mootness was not achieved "through happenstance," *Munsingwear*, 340 U.S. at 40, or circumstances "unattributable to any of the parties." *Karcher*, 484 U.S. at 83. Rather, petitioners chose to comply with the outstanding district court order, and eliminate the live aspect of the controversy. If petitioners were intent on preserving their right to appeal the underlying decision, all that was necessary was for one or more of the thirteen employees to "have refused to comply with the district court's order of enforcement * * * [and] have then risked

---

[5] See also *United States* v. *Constangy, Brooks & Smith*, *supra* (post-judgment compliance with order to produce documents pursuant to FOIA after stay denials; appeal dismissed as moot, but motion to vacate denied); *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302 (9th Cir. 1983) (post-judgment compliance with subpoena after stay denials; appeal mooted, but case not vacated); *United States* v. *Sweet*, *supra* (post-judgment compliance with summons after temporary stay; appeal dismissed as moot, but case not vacated).

[6] The case was plainly moot, because once petitioner had complied with the district court's judgment, there was no further relief that the court of appeals could have granted. See, *e.g.*, *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam); *United States* v. *Garde*, 848 F.2d at 1309.

civil contempt sanctions." *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302, 1303 (9th Cir. 1983). If the reviewing court had ruled that the underlying order was erroneous, the employees would have enjoyed a complete defense to the imposition of civil contempt sanctions. See *United States* v. *United Mine Workers*, 330 U.S. 258, 295 (1947); *St. Regis Paper Co.*, 717 F.2d at 1303; cf. *Scott & Fetzer Co.* v. *Dile*, 643 F.2d 670, 675 & n.8 (9th Cir. 1981) (collecting cases).

Although there is, to be sure, some risk involved in undergoing civil contempt, that is what courts require for appeal in a variety of contexts. For example, a non-party witness seeking to challenge an unappealable interlocutory discovery order must "refuse to comply and submit to a contempt proceeding" to achieve the necessary finality to perfect an appeal. *FTC* v. *Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985); see also *DeMasi* v. *Weiss*, 669 F.2d 114, 122 (3d Cir. 1982). Similarly, an employer seeking to challenge an OSHA search warrant may "refuse entry pursuant to the warrant and then challenge the warrant before the district court when the Secretary brings civil contempt proceedings." *Rockford Drop Forge Co.* v. *Donovan*, 672 F.2d 626, 631 (7th Cir. 1982). See also *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485, 1488-1489 (11th Cir. 1989) (Trinity incurred one day of $10,000 per day civil contempt assesment and Mosher Steel incurred one day of $1000 per day assessment rather than permit OSHA inspections pursuant to warrants); *Donovan* v. *Burlington Northern, Inc.*, 781 F.2d 680, 684 (9th Cir. 1986) (noting that resistance to valid OSHA warrant "need not be without financial risk even in a free society").

Under these circumstances, a *Munsingwear* order vacating the judgment was not required.[7] Indeed, several features of this case made it particularly

---

[7] None of this Court's cases cited by petitioners (Pet. 3) involved situations comparable to that presented here. See *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (challenge to order to arbitrate mooted by completition of arbitration); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975) (prisoner challenging transfer decision to higher security facility was later transferred back to lower security facility); *Parker* v. *Ellis*, 362 U.S. 574 (1960) (per curiam) (prisoner petitioning for habeas corpus was released from custody); *United States* v. *Munsingwear*, *supra* (intervening change in law); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267, 267-268 (1936) (because of post-judgment modification of challenged contract, district court judgment should have been vacated and action retried based on new contract).

In *New Left Educ. Project* v. *Board of Regents*, 472 F.2d 218 (5th Cir.), vacated, 414 U.S. 807 (1973), a district court struck down on constitutional grounds certain rules promulgated by a state university. While the case was on appeal, the university mooted the case by repealing the rules and adopting new ones. After the court of appeals declined to vacate the district court judgment—concluding (472 F.2d at 221) that the case did not become moot through "happenstance" but through the university's voluntary action—this Court summarily vacated the judgment, and remanded to the district court with directions to dismiss the case as moot. 414 U.S. 807. The *New Left* case implicated two concerns not present here. First, the judgment in question rested on constitutional grounds; its vacation is consistent with this Court's prudential concern to avoid pronouncements on constitutional issues when the case does not so require. Second, a public body's adoption of new regulations, even if consistent with a district court judgment, reflects public policy choices, and is not equivalent to a private party's decision to comply with a court order requiring testimony under subpoena. See *Clarke* v. *United States*, 915 F.2d 699, 706-708 (D.C. Cir. 1990) (en banc).

inappropriate for the relief petitioners sought. First, although petitioners did not appear to challenge on appeal the district court's rulings that Trinity could not intervene and that its attorneys could not represent the employees, see App., *infra*, 5a, they nonetheless sought to vacate all aspects of the judgment. Petitioners have no equitable interest in eliminating the preclusive force of rulings that they did not seek to challenge on appeal.[8] Second, the Secretary, as the prevailing party, has a strong interest in preserving the preclusive effect of the judgment as applied to other actions involving Trinity, which is, regrettably, a frequent litigant in OSHA enforcement authority cases.[9]

---

[8] Although it is possible that the court of appeals could have disentangled the issues, and vacated only the aspects of the judgment to which petitioners objected, petitioners did not request partial vacatur, even in the alternative. Nor did they do so in their petition for rehearing or in their petition in this Court.

[9] See, *e.g.*, *Dole* v. *Trinity Indus., Inc.*, 904 F.2d 867 (3d Cir.), cert. denied, 111 S. Ct. 555 (1990); *Dole* v. *Trinity Indus., Inc.*, 898 F.2d 1049 (5th Cir. 1990); *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485 (11th Cir. 1989); *Industrial Steel Prods. Co.* v. *OSHA*, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988); *Donovan* v. *Trinity Indus., Inc.*, 824 F.2d 634 (8th Cir. 1987); *Donovan* v. *Mosher Steel Co.*, 791 F.2d 1535 (11th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, 475 U.S. 1081 (1986); see also Pet. App. A30. In fact, there have been two other cases thus far in which other Trinity employees have challenged the Secretary's subpoena authority and in which Trinity has sought to intervene. *Herman* v. *Dole*, Civ. Action No. 4-90-324-K (S.D. Tex. filed July 30, 1990) (action for declaratory and injunctive relief); *Dole* v. *Barrios*, 1990 O.S.H. Dec. (CCH) ¶ 29,052 (N.D. Tex. 1990).

We recognize that in some instances, courts of appeals have applied the *Munsingwear* procedure when a party first appealed an order requiring the production of information, and then mooted the case by complying with the order. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-1130, 1133 (3d Cir. 1982) (case became moot after an inspection warrant was fully executed; court vacated district court order directing compliance with the warrant); *United States* v. *Cleveland Elec. Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982) (per curiam) (same); *United States* v. *Kis*, 658 F.2d 526, 532-535 & n.20 (7th Cir. 1981) (compliance with IRS summons for handwriting exemplars mooted appeal; court remanded with instructions to vacate summons enforcement order), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Silva & Silva Accounting Corp.*, 641 F.2d 710, 711 (9th Cir. 1981) (production of documents under IRS summons mooted appeal; court remanded with instructions to vacate enforcement order). But, unlike in this case, in none of those cases did the prevailing party appear to oppose the vacation of the underlying judgment and the dismissal of the enforcement action. The prevailing party's concurrence (or acquiescence) in a motion to vacate is an important consideration, because it is the prevailing party who stands to benefit most directly—through application of res judicata principles—from the preservation of the judgment.

The *Munsingwear* doctrine has always been applied with a view toward furthering its underlying purposes. As the purposes of the doctrine did not require vacation of the district court's judgment in this case—and, indeed, they strongly favor allowing the judgment to stand—further review of petitioners' claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

NATHANIEL I. SPILLER
Senior Appellate Attorney
Department of Labor

APRIL 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-89-2539-D

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor, PLAINTIFF,

vs.

BENNY BAILEY, ET AL., DEFENDANTS.

[Filed Apr. 27, 1990]

ORDER

Before the court is defendants' motion to stay execution of proceedings to enforce the court's April 23, 1990 judgment pending appeal of that judgment to the Fifth Circuit. Defendants contend their right of appeal will be futile if a stay is not granted.

The United States Secretary of Labor ("Secretary") initiated this action against defendants, certain employees of Trinity Industries, Inc. ("Trinity"), seeking to enforce administrative subpoenas issued pursuant to 29 U.S.C. § 657(b). The court referred various matters to the United States Magistrate pursuant to 28 U.S.C. § 636(b), and in a memorandum opinion and order entered April 9, 1990, affirmed *inter alia* the magistrate's recommendation that the subpoenas be enforced. Final judgment was thereafter entered.

Defendants filed their notice of appeal to the Fifth Circuit on April 25, 1990, and now seek to stay enforcement of the court's judgment pending appeal. Because the Secretary seeks only declaratory or injunctive-type relief through this action, the decision whether to grant a stay pending appeal is discretionary with the court. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2905 (1973 and Supp. 1990); Fed. R. Civ. P. 62(a) and (c). In exercising its discretion, the court utilizes the same factors employed by the circuit court in determining whether to grant a stay under Fed. R. App. P. 8(a). In order to obtain a stay, the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057, 1059 (5th Cir. 1987).

The court need only address the first and fourth factors. Defendants have presented no authority to suggest they are likely to succeed on the merits. Given the express language of § 657(b), defendants' success is unlikely indeed. Nor have defendants attempted to explain how granting a stay will serve the public interest. Enforcing the subpoenas and thus allowing the disputed interviews to take place can only serve the public interest, particularly if the interviews uncover safety deficiencies in Trinity's facilities. On the other hand, granting a stay and thus *not* allowing the interviews to take place truly serves the interests of but one party—Trinity.

Because defendants have not satisfied—indeed have not attempted to satisfy—the relevant factors, defendants' motion for a stay pending appeal is denied.

SO ORDERED.

April 27, 1990.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1326

ELIZABETH DOLE, Secretary of Labor,
U.S. Department of Labor, PLAINTIFF-APPELLEE,

versus

BENNY BAILEY, ET AL., DEFENDANTS-APPELLANTS.

[Filed Apr. 30, 1990]

Appeal from the United States District Court for the Northern District of Texas

---

Before HIGGINBOTHAM, SMITH and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant(s) for stay pending appeal is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-89-2539-D

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor, PLAINTIFF,

v.

BENNY BAILEY, ET AL., DEFENDANTS.

[Filed Apr. 25, 1990]

NOTICE OF APPEAL

Notice is hereby given that Defendants Benny Bailey, Jerry Calloway, Israel Casinono, Donald Collier, Emmett Combs, Labon V. Cook, Victor Lopez, Sidney Robertson, Charlie Sandoval, C.L. Sheigg, William Square, Lindsay Williams, and Paul Williams hereby appeal to the United States Court of Appeals for the Fifth Circuit from the district court's denial of Defendants' Motion to Dismiss and the grant of the Secretary of Labor's Motion to Enforce Subpoenas, entered the 23rd day of April, 1990.

Dated this 25th day of April, 1990

Respectfully submitted,

LOCKE PURNELL RAIN
HARRELL
(A Professional Corporation)

/s/ A. Darby Dickerson
ROBERT E. RADER, JR.
A. DARBY DICKERSON
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was sent via First Class Mail to Robert A. Fitz, counsel for the Secretary of Labor, this 25th day of April, 1990.

/s/ A. Darby Dickerson
A. DARBY DICKERSON

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20469